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Supreme Court, U.S.
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No. 00-1842

IN THE

Supreme Court of the United States

STATOIL ASA,

Petitioner,

—v.—

HEEREMAC, V.O.F., *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF THE McDERMOTT AND HEEREMA RESPONDENTS

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July 12, 2001

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Sherman Act does not afford relief to a foreign plaintiff complaining of injury suffered in foreign commerce, when such injury does not arise from proscribed effects on United States trade or commerce.

2. Whether the court of appeals correctly held that a showing of antitrust injury may not be predicated upon allegations that persons other than plaintiff suffered proscribed anticompetitive effects in United States trade or commerce.

LIST OF PARTIES BELOW

The parties to the appeal in the United States Court of Appeals for the Fifth Circuit were as follows:

Statoil ASA, previously known as Den norske stats oljeselskap a.s., was the Plaintiff-Appellant.

Heeremac, v.o.f.; Heerema Marine Contractors; Heerema Offshore Services U.S., Inc.; Heerema Offshore Construction Group, Inc.; Jan Meek; Pieter Heerema; McDermott International, Inc.; McDermott Inc.; J. Ray McDermott, S.A.; J. Ray McDermott, Inc.; J. Ray McDermott Gulf Contractors, Inc.; McDermott Engineers & Constructors (USA), Inc.; McDermott Engineering Houston, L.L.C.; McDermott-ETPM, Inc.; Saipem SpA; Saipem International B.V.; Saipem UK Limited; and Saipem (Portugal)-Comerico Maritimo, Sociedade Unipessoal, S.A. were the Defendants-Appellees.

RULE 29.6 STATEMENT

Respondent McDermott International, Inc. ("McDermott") is a public corporation. No public corporations hold more than ten percent of McDermott stock. Respondents McDermott Inc.; J. Ray McDermott, S.A.; J. Ray McDermott, Inc.; J. Ray McDermott Gulf Contractors, Inc.; McDermott Engineers & Constructors (USA), Inc.; McDermott Engineering Houston, L.L.C.; and McDermott-ETPM, Inc. are or were direct or indirect wholly-owned subsidiaries of McDermott.

Respondent Heerema Marine Contractors ("Heerema") is a privately owned corporation. Respondents Heerema Offshore Services U.S., Inc. and Heerema Offshore Construction Group, Inc. are or were direct or indirect wholly-owned subsidiaries of Heerema.

HeereMac, v.o.f., which was dissolved in 1997, was a concentrative joint venture between J. Ray McDermott, S.A. and Heerema Offshore Construction Group, Inc. under the laws of The Netherlands.

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The McDermott and Heerema Respondents respectfully submit that a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on February 5, 2001 should not issue because no question worthy of the exercise of the Court's certiorari jurisdiction is presented and no error was committed by the court below.

COUNTERSTATEMENT OF THE CASE

The opinion below is a sound application of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") to antitrust claims that lack the requisite nexus to the U.S. marketplace. It imposes no limits on the rights of foreign plaintiffs to pursue claims that arise from direct, substantial and reasonably foreseeable anticompetitive effects on U.S. commerce (a standard that Petitioner does not meet), and it does not preclude the U.S. government from vigorously prosecuting foreign-based activities that cause such effects. The only practical effect of the ruling is to relegate Petitioner's non-U.S. claims to the Norwegian forum where they are now pending, subject to the choice of law provisions in Petitioner's project agreements. A contrary ruling would have placed U.S. courts in the unintended position of policing competitive conditions worldwide.

The *Statoil* opinion does not conflict with the rulings of this Court or the decisions of any other circuit court, and Petitioner's assertion that the law on this subject is in disarray ignores the uniform body of case law in accord with *Statoil*. Petitioner is unable to cite a single decision, in the nineteen-year history of the FTAIA, that extends Sherman Act jurisdiction to claims that do not arise from an anticompetitive effect on U.S. trade or commerce.

Facts

Petitioner Statoil ASA (which brought this action under its previous name, Den norske stats oljeselskap a.s.) is a Norwegian corporation with its principal place of business in Norway. Amended Complaint ¶ 1.[1] Statoil is owned by the Government of Norway and owns and operates off-shore oil and gas platforms in the Norwegian Sector of the North Sea. *Id.* p. 1 and ¶¶ 76, 80. Statoil purchased heavy-lift marine construction services in the North Sea from HeereMac, v.o.f., and Saipem UK Limited, which had their principal places of business in The Netherlands and England, respectively. The contracts governing these sales contained forum selection and choice of law clauses that require dispute resolution under Norwegian law. 16 R. 677-74, 416, 411, 485, 477-43, 434, 430-27.[2]

Statoil alleges that as a result of a "single conspiracy . . . worldwide in scope," it was overcharged for heavy-lift services it commissioned from non-U.S. contractors in Norway, and that "[its] damages have been incurred in connection with projects in the Norwegian Sector of the North Sea." Amended Complaint p. 2 and ¶¶ 55, 61-63, 65, 72, 77, 80. In December 2000, Statoil filed parallel complaints against Respondents in Norway, seeking damages under the Norwegian Competition Act of June 11, 1993, the Norwegian Prices Act and attendant Regulations on Restrictive Trade Agreements on Prices and Mark-Ups, *inter alia*, based on the same

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[1] The allegations in Statoil's Amended Complaint were assumed to be true for purposes of Defendants' motions to dismiss.

[2] Citations in this form are to the record below.

facts it alleges here. *See* Pet. at 10 n.8.[3] In its antitrust complaints in Norway, Statoil reiterates that its alleged injury arose from market restrictions there:

> "In this case the place in which the harmful event was caused coincides with the place in which the harm arose. The restrictive practices cooperation has had consequences for the demand for heavy-lift services in Norway. Moreover, the damage was caused in Norway in that Statoil's head office is located in Stavanger [Norway] and it was in Stavanger that the excessive price was paid." A17, ¶ 3.1.3.

Statoil does not allege that it owns, operates or has commissioned any oil drilling platforms within the territorial waters of the United States, or that it purchased any heavy-lift marine construction services in this country. Statoil does not allege that it conducted business with any contractor in the United States or with any contractor incorporated here. Statoil does not contend that its alleged injuries arose from any anticompetitive effect on U.S. trade or commerce. Rather, it asserts that *other* oil companies paid higher prices for heavy-lift marine construction services in the Gulf of Mexico as a result of collusive conduct directed against those unrelated oil companies. (*See* 16 R. 391, 390-89; ¶¶ 74, 78.) Although Statoil had no involvement with those transactions and was not injured thereby, it asked the district court to assert jurisdiction over its claims and to afford it antitrust standing, based on allegations that other persons could show injuries arising from the anticompetitive effects of the alleged conspiracy on U.S. trade or commerce. The district court dis-

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[3] A representative sample of Statoil's Norwegian complaints against Respondents has been lodged with this Court. Citations in the form A___ are to Respondents' Lodging.

missed Statoil's Amended Complaint, and the Court of Appeals for the Fifth Circuit affirmed.

Decision of the Court of Appeals

The court below followed the express dictates of Congress, embodied in the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), in holding that claims of antitrust injury that do not arise from anti-competitive effects on U.S. commerce are not actionable under the Sherman Act.[4] In particular, the court affirmed the dismissal of Statoil's Sherman Act claims arising from alleged overcharges by Dutch and British contractors for services contracted for in Norway and performed in the Norwegian section of the North Sea.

This ruling did *not* depart from the principle "that the Sherman Act applies to foreign conduct that was meant to and did in fact produce some substantial effect in the United States." *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796 (1993). The court acknowledged that foreign plaintiffs injured by reason of proscribed effects on U.S. commerce may assert Sherman Act claims. 18a n.28. However, it rejected Petitioner's unfounded view that a claimant whose injury did *not* arise from proscribed domestic effects may nevertheless bring a Sherman Act claim whenever the claims of any other person satisfied that jurisdictional test. 18a-19a. The court correctly concluded that Statoil's unprecedented reading of the antitrust laws "would open United States courts to global claims on a scale never intended by Congress." 22a.

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[4] Copies of the court of appeals' ruling and the text of the FTAIA are reproduced in the Appendix annexed to the Petition for a Writ of Certiorari. Citations in the form __ a are to pages in Petitioner's Appendix.

The court's ruling found ample support in the text of the FTAIA and its legislative history (including key passages elided in the Petition) (14a-20a), and in this Court's admonition that "United States antitrust laws do not regulate the competitive conditions of other nations' economies." 3a (quoting *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S 574, 582 (1986)). The decision distinguished a supposedly conflicting circuit court case on the basis of its materially different facts (20a), and it noted the uniform rejection of Petitioner's approach by district courts within various other circuits. *Id.* The court also took note of Petitioner's inability to cite a single case that adopted the dramatic expansion of Sherman Act jurisdiction and standing it proposes here. *Id.* The panel majority carefully considered and answered each of the objections raised in the dissenting opinion. *See* 12a n.19, 14a n.23, 16a n.25, 17a n.27, 18a n.28, 20a n.30, 21a n.31. Statoil's petition for a panel rehearing and for rehearing en banc was denied. 54a.

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals Correctly Applied Governing Law in Rejecting Statoil's Novel Theory of Derivative Jurisdiction and Standing

Statoil's lawsuit is based on the alleged payment of overcharges by a foreign corporation on foreign construction contracts performed by Dutch and British corporations in Norwegian waters, allegedly to the detriment of Statoil's operations in Norway, with no direct repercussions on the U.S. marketplace. Because the Sherman Act does not regulate trade or commerce

among foreign nations, such claims are inherently beyond the jurisdiction of U.S. courts.[5]

The court below rejected Statoil's argument that the Foreign Trade Antitrust Improvement Act of 1982 had somehow extended Sherman Act jurisdiction to encompass all repercussions of an alleged global conspiracy so long as any aspect of the conspiracy was actionable here. This decision is clearly correct. The FTAIA was not enacted to expand Sherman Act jurisdiction, but rather "to promote certainty in assessing the applicability of American antitrust law to international business transactions. . . ." H.R. Rep. No. 97-686 97th Cong., 2d Sess. (1982) ("H.R. Rep.") at 9. Congress noted that "legislative clarification" in this area was appropriate because courts had differed "in their expression of the proper test for determining whether United States jurisdiction over international transactions exists." It therefore amended both the Sherman Act and the FTC Act to "formulate a standard to be applied uniformly throughout the judicial system." *Id.* at 6.[6]

As it relates to Statoil's antitrust claim, the FTAIA provides that the Sherman Act "*shall not apply*" to conduct involving non-import foreign trade or commerce "*unless*" it produces a direct, substantial and reasonably foreseeable effect on U.S. domestic commerce, "*and such effect gives rise to a claim under [the Sherman Act].*" 15

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[5] Footnote 18 of the opinion below recognizes the limitation of Article I, § 8 of the Constitution, authorizing Congress to "regulate commerce with foreign nations." *See* 30a n.18.

[6] In this regard, Congress cited with favor the observation of Judge Learned Hand, speaking for the Second Circuit acting in place of the Supreme Court, that "[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945). *See* H.R. Rep. at 5.

U.S.C. § 6a, sections 1(A) and (2); 72a - 73a (emphasis added). The common-sense meaning of this restriction puts Statoil's claim beyond the reach of the Sherman Act because it does not arise from the domestic effects that Statoil cites as a basis for jurisdiction. No provision in the FTAIA creates jurisdiction over claims arising from competitive harm in foreign markets.

Statoil's argument to the contrary is based on a novel reading of section 2 of the FTAIA to provide that if *any* person can state a Sherman Act claim based on the domestic anticompetitive effects of an alleged global conspiracy, then *every* adverse effect worldwide may be redressed by U.S. courts. Such a drastic growth of Sherman Act jurisdiction surely cannot be inferred from the mere use of the indefinite article "a" in a statute designed to define jurisdictional limits. *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 251 (1991) ("[I]f we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption.").[7]

The legislative history of the FTAIA gives no hint that Congress intended to expand Sherman Act jurisdiction in the manner Statoil asserts. As originally reported by the House Judiciary Committee, section 2 of the bill stated that the proscribed effect necessary to

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[7] As plaintiff, Statoil bears the burden of demonstrating the subject matter jurisdiction of the district court. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 188-89 (1936). Because it is arguing for the expansion of the extraterritorial reach of the Sherman Act, Statoil also bears the heavy burden of demonstrating "the affirmative intention of the Congress clearly expressed" in favor of such expansion. *See Arabian American Oil Co.*, 499 U.S. at 248; *Sale v. Haitian Ctrs. Council Inc.*, 509 U.S. 155, 188 (1993) ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested.").

satisfy section 1 must also be "the basis of the violation alleged." H.R. Rep. at 18. This language was added to "require that *the 'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws.*" *Id.* at 12 (emphasis added). Congress explained that it included this limitation to clarify that the bill was not "intended to confer jurisdiction on injured persons when *that injury* arose from conduct with no anticompetitive effects on the domestic marketplace." *Id.* at 11 (emphasis added). Petitioner puts undue emphasis on a subsequent change in the wording of section 2 to require that "such effect give[ ] rise to a claim" under the Sherman Act. But the proponent of this technical change explained that the new language "accomplishes the same result as the Committee version" — *i.e.*, to specify that the basis of American antitrust jurisdiction must be a domestic anticompetitive effect. *Id.* at 18. The language adopted does not suggest an intent to amend the Sherman Act to reach claims that do not arise from such an effect.[8]

In view of Congress' unequivocal formulation of this domestic effects test, Statoil reads too much into the observation that the qualifying impact does not have to be "experienced by the injured party within the United States." *Id.* at 12. This merely reiterates Congress' statement, "as previously set forth", that no matter where they take title, "[f]oreign purchasers should

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[8] Statoil did not mention Mr. Rodino's "additional views" before the court of appeals issued its ruling. In no event could the isolated remarks of a single legislator serve as a clear manifestation of Congress' intent to expand Sherman Act jurisdiction. *See West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98-99 (1991) ("Where the [statutory text] contains a phrase that is unambiguous — that has a clearly accepted meaning in both legislative and judicial practice — we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.").

enjoy the protection of our antitrust laws *in the domestic marketplace*" with respect to "*a course of conduct in the United States.*" *Id.* at 10 (emphasis added). Statoil omits this key language from its quotation of the House Report. *See* Pet. at 18.[9]

II.

The Decision Below Does Not Conflict With Decisions Of Other Circuits Or Rulings Of This Court

Petitioner repeatedly implies that the Fifth Circuit's interpretation of the FTAIA is in conflict with the rulings of other circuits. However, the single decision on which Petitioner posits a conflict is consistent with the decision below, although a materially different set of facts yielded a different outcome. *See Caribbean Broadcasting System v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998) (holding that a radio broadcaster whose market included Puerto Rico and the U.S. Virgin Islands should have been allowed to file an amended complaint that "more clearly alleged an effect upon U.S. commerce" to satisfy the requirements of the FTAIA). Far from adopting a standard different from

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[9] Statoil inexplicably cites the FTAIA's export trade proviso as support for its expansive reading of the statute. The proviso states that if the Sherman Act applies to conduct only because it produces a proscribed effect on U.S. export trade, a remedy is available only for injury to export business in the United States. This restriction reinforces Congress's concern with protecting U.S. trade or commerce by emphasizing that the foreign side of an export transaction is not the concern of the Sherman Act. It was unnecessary to specify this limitation for injuries arising from harm to U.S. domestic or import commerce because by definition such injuries have the required nexus. In any event, Congress specified that transactions between foreign firms "should, for purposes of this legislation, be treated in the same manner as export transactions." H.R. Rep. at 9.

that in *Statoil*, the Court of Appeals for the D.C. Circuit observed that the FTAIA permits jurisdiction over foreign conduct "only to the extent" that such conduct produces anticompetitive harm in the U.S. market. *Id.* at 1085. *See* Pet. at 13 n.10.

The *Caribbean* court did not allow a plaintiff in foreign commerce to "piggy-back" a Sherman Act claim on the alleged injury of unrelated parties in U.S. domestic commerce. Rather, it noted that case law rejecting that approach did not apply to the facts at hand because plaintiff there was able to satisfy the requirements of the FTAIA in its own right. *Id.* at 1086. Plaintiff's proposed amended complaint included allegations that (1) the eastern Caribbean market for the sale of radio advertising includes Puerto Rico and the U.S. Virgin Islands; (2) plaintiff competes with defendants for the sale of advertising to customers in the United States; and (3) defendants had improperly locked up available advertising contracts in the U.S. market, causing direct injury to plaintiff by foreclosing it from the U.S. marketplace. *Id.* at 1086-87. The court ruled that such allegations supported Sherman Act jurisdiction because plaintiff's foreclosure from selling advertising to U.S. advertisers deprived the latter of the benefits of competition. *Id.* at 1087. Plaintiff's alleged injury in *Caribbean* thus arose from anticompetitive domestic effects, as the FTAIA requires.

The court below recognized that plaintiffs who can make such a showing may invoke the subject matter jurisdiction of the U.S. courts. *See* 20a. However, it affirmed the dismissal of Statoil's complaint because, in contrast to the plaintiff in *Caribbean*, Statoil could not allege that its injury arose from the domestic anticompetitive harm it cited as a basis for its Sherman Act claim. *Id.*

Perhaps the clearest indication of the absence of a conflict between these circuits is the fact that just last

month the district court for the District of Columbia, in an opinion by Chief Judge Thomas F. Hogan, relied on *Statoil* (and numerous other consistent cases) to reject a claim of derivative Sherman Act jurisdiction of precisely the sort asserted here. *See Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, Civ. No. 00-1686, 2001 WL 761360, at *2 (D.D.C. June 6, 2001), *appeal docketed* (D.C. Cir. July 7, 2001):

> "[U]nder federal antitrust law, to establish subject matter jurisdiction over this action, plaintiffs must allege that the conduct causing their injuries resulted in a 'direct, substantial, and reasonably foreseeable effect on U.S. commerce.' In addition, plaintiffs must also allege that the injuries they seek to remedy 'arise' from an anticompetitive effect of defendants' conduct on U.S. commerce. In other words, the effect providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws."

District courts within other circuits have likewise distinguished *Caribbean Broadcasting* as a case where "it was in fact the substantial effect on United States commerce which gave rise to plaintiff's injury and claim under the antitrust laws." *Ferromin International Trade Corp. v. UCAR International, Inc.*, C.A. No. 99-693, slip op. at 7 (E.D. Pa. June 13, 2001) (reproduced in Respondents' Lodging at B-1 *et seq.*); *accord Metallgesellschaft AG v. Sumitomo Corp.*, 117 F. Supp. 2d 875, 885-86 (W.D. Wisc. 2000); *Lantec, Inc. v. Novell, Inc.*, Case No. 2:95-CV-97-ST, 2000 U.S. Dist. LEXIS 19905, at *17 (D. Utah, Sept. 15, 2000).[10]

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[10] The earlier ruling of the D.C. Circuit in *Laker Airways Limited v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984), is also consistent with *Statoil*. The *Laker* complaint alleged "a conspiracy to drive out of business a corporation permitted by United States treaty to operate within the

Footnote continued on next page.

Petitioner also cites several cases that supposedly reflect "a considerably more expansive interpretation of antitrust jurisdiction" than that reflected in *Statoil* (*see* Pet. at 28), even though none of them "reach[ed] the precise question addressed by the court below." *Id.* These decisions merely articulate the generic, uncontested principle that foreign activities may trigger Sherman Act jurisdiction in appropriate cases – a concept that the *Statoil* opinion accepts. None of them considers the application of the FTAIA to the claims of a foreign plaintiff arising from the non-U.S. effects of an alleged global conspiracy. *E.g., United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998) (sustaining an indictment based on an alleged conspiracy to raise prices on products intended for import into the United States). One even confirms that purely foreign conduct and effects lie beyond the jurisdiction of the Sherman Act. *See McGlinchy v. Shell Oil Co.*, 845 F.2d 802 (9th Cir. 1988).[11]

This Court's comity analysis in *Hartford Fire* also has no bearing on Statoil's Petition, except as further confirmation that the goal of Sherman Act regulation is the prevention of anticompetitive effects in the U.S. domestic marketplace. *See Hartford Fire*, 509 U.S. at 796. De-

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United States and conducting substantial business here." *Id.* at 955. The court's assertion of jurisdiction was a routine application of the principle that participants in the U.S. domestic marketplace may seek redress under the Sherman Act for injuries arising from harm caused by foreign activity to U.S. trade or commerce.

[11] *McGlinchy* supports the decision below on the alternative ground that conduct directed against a participant in a foreign market does not have a direct, substantial and reasonably foreseeable effect on U.S. commerce. *See McGlinchy*, 845 F.2d at 813 (citing Section (1)(A) of the FTAIA).

fendants in *Hartford Fire* were domestic and British reinsurers accused of conspiring to withhold certain products from the U.S. insurance market. The intended and actual result of the alleged conduct was to harm the market for insurance in the United States. *Id.* Because the defendants conceded subject matter jurisdiction, the only questions before the Court were the availability of McCarran-Ferguson Act immunity, and the application of principles of international comity in the context of a regulated industry. Under these circumstances, this Court's reference to the maxim that the Sherman Act applies to foreign conduct that produces anticompetitive domestic effects cannot fairly be read as an endorsement of Petitioner's view that nondomestic effects of an international conspiracy are actionable here. Indeed, that construction would conflict with this Court's more relevant observation in *Matsushita* that "American laws do not regulate the competitive conditions of other nations' economies." *Matsushita*, 475 U.S. at 582.[12]

Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978), likewise lends no support to Statoil's theory. In *Pfizer* the Court was faced only with the question whether antitrust remedies should be available "*[w]hen a foreign nation enters our commercial markets* as a purchaser of goods or services." *Id.* at 318 (emphasis added). It ruled only "that a foreign nation otherwise entitled to sue in our courts is entitled to sue for treble damages under the antitrust laws to the same extent as any other

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[12] As this Court explained in *Matsushita*, "However one decides to describe the contours of the asserted conspiracy—whether there is one conspiracy or several—respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief." *Matsushita*, 475 U.S. at 584 n.7 (holding that Court of Appeals had erred in allowing plaintiffs to base antitrust claims on aspects of an alleged international conspiracy that did not injure them).

plaintiff." *Id.* at 320. *Pfizer* preceded the enactment of the FTAIA by four years, and this Court did not consider the applicability of the Sherman Act to injuries sustained outside the U.S. domestic marketplace.

Finally, Petitioner is flatly wrong in contending that "no other courts that have construed the FTAIA have adopted a requirement that the injury giving rise to jurisdiction must arise directly from an effect on U.S. commerce." Pet at 27. District courts within at least five other circuits have addressed the same theory of bootstrap jurisdiction presented in Statoil's Petition. (These civil suits have typically followed well-publicized prosecutions of international cartels.) Every district court that has considered this issue has rejected the application of the Sherman Act to claims of foreign plaintiffs that do not arise from adverse effects on U.S. commerce.[13] *See, e.g., Ferromin*, slip op. at 8, 11:

> "Based on the plain language of the FTAIA and the above authority, we find that the FTAIA permits jurisdiction over antitrust claims of foreign plaintiffs who were injured in foreign market places only where the complained-of conduct had a direct, substantial and reasonably foreseeable effect on the domestic market place *and* that this anticompetitive effect on the domestic marketplace gave rise to their injuries."
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> * * *
>
> "[I]f we were to exercise subject matter jurisdiction despite plaintiffs failure to show the requisite causal connection, we would in effect be ex-

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[13] Some cases have premised the dismissal of claims arising from non-U.S. injury on the plaintiff's lack of standing in addition to or instead of lack of Sherman Act jurisdiction. *See, e.g., In re Microsoft Corp. Antitrust Litigation*, 127 F.Supp. 2d 702 (D. Md. 2001); *de Atucha v. Commodity Exchange, Inc.*, 608 F. Supp. 510 (S.D.N.Y. 1985).

> tending the Sherman Act to cover claims for damages suffered by foreign companies solely because of decreased competition and higher prices in foreign markets, thereby inviting foreign customers, lured by the prospect of treble damages, to flood the United States courts. We do not think this is the result Congress intended in enacting the FTAIA." (emphasis in original; citations omitted.)

Accord Empagran, 2001 WL 761360, at *2 (same); *Sumitomo*, 117 F. Supp. 2d at 877, 887 (same); *Kruman v. Christie's International PLC*, 129 F. Supp. 2d 620 (S.D.N.Y. 2001) (same); *In re Microsoft Corp. Antitrust Litigation*, 127 F. Supp. 2d 702, 715 (D. Md. 2001). *See also United Phosphorus, Ltd. v. Angus Chemical Company*, 131 F.Supp.2d 1003, 1008 (N.D. Ill. 2001) ("'[A] foreign company cannot demonstrate the domestic injury requirement by piggy-backing onto the injury of a United States exporter.'") (citation omitted); *Lantec*, 2000 U.S. Dist. LEXIS 19905, at *19 (rejecting argument that Sherman Act applies to a claim of foreign injury that is "inextricably intertwined" with U.S. domestic injury).[14]

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[14] The court in *Sumitomo* expressly considered and rejected the notion that the term "a claim" in section 2 of the FTAIA permits jurisdiction based on claims other than plaintiff's own claim. 117 F. Supp. 2d at 833:

> "Plaintiffs' reading is that '*a*' claim means only that there must be *some* claim that arises, whether or not it is the claim that the plaintiff is asserting. I find this reading unpersuasive. It does not acknowledge either the language of the act, which is explicit in stating that it is the effect of the conduct that is the focus of Congress's concern, the congressional purpose in enacting the legislation, which was to clarify the antitrust laws 'to make explicit their application only to conduct having a "direct, substantial, and reasonably foreseeable effect" on domestic commerce or domestic exports,' or the comity concerns that would be implicated by expanding the reach of American antitrust law to remedy anticompetitive effects on a foreign market . . . . " (emphasis in original).

In contrast, Statoil has not cited a single case in which a court sustained an antitrust claim based on foreign-based injury that does not arise from proscribed harm to the U.S. marketplace. Thus, far from being in "disarray," or in a "muddled mess," the case law that has developed on this issue over the last two decades is in full accord with *Statoil* and runs directly and uniformly against the position asserted by Petitioner.

It remains to be seen whether the pending appeals of some of the foregoing district court rulings will yield the novel and unfounded result Petitioner urges here. Several appellate courts will consider this subject in the near future,[15] and this Court may benefit from the development of relevant case law in other circuits. However, since the illusory conflict suggested by Petitioner may never emerge, any issue potentially worthy of certiorari is far from ripe. *See Brown v. Texas*, 522 U.S. 940 (1997) (denying petition for writ of certiorari and noting that "the likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals 'to serve as laboratories in which the issue receives further study before it is addressed by this Court.'") (citation omitted); *Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States court of appeals and state courts concerning the meaning of provisions of federal law.") The decision of the Fifth Circuit is not in conflict with the decision of another federal court of appeals or any state court; nor is it contrary to any ruling of this Court. Accordingly, certiorari is not warranted. *See* Sup. Ct. R. 10.

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[15] Appeals have already been docketed in *Sumitomo*, No. 00-3700 (7th Cir. Oct. 16, 2000), *Kruman*, No. 01-7307 (2d Cir. Mar. 19, 2001), and *Empagran* (D.C. Cir. July 6, 2001).

III.

The Petition Raises No Other Issue Worthy Of This Court's Review

Like the dissenting opinion below, Statoil raises the specter of international lawlessness as a result of the court of appeals' decision. This argument invites the Court to substitute its own judgment for the policy choices inherent in the FTAIA. In enacting the FTAIA Congress expressly considered and rejected criticism regarding the risks of international cartels, noting that "[b]y more precisely defining the subject matter jurisdiction of U.S. antitrust law, [the FTAIA] in no way limits the ability of a foreign sovereign to act under its own laws against an American-based export cartel having unlawful effects in its territory." H.R. Rep. at 13-14. While confirming that any spill-over effects of foreign activity on U.S. commerce will remain subject to prosecution here (*id.* at 13), Congress noted that "the clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets." *Id.* at 14.[16] These re-

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16 In declining to modify the text of the FTAIA in response to a commentator's concerns about international enforcement, *see* H.R. Rep. at 14, Congress cited with favor the comments of James R. Atwood before the House Committee on the Judiciary. *Id. See* Foreign Trade Antitrust Improvements Act: Hearings on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong. 91-93 (1981) (statement of James R. Atwood, at 6-8). In the referenced portion of his statement, Mr. Atwood observed that "over-expansive interpretations of the Sherman Act . . . can impede U.S. export performance" and allow foreign plaintiffs "to frustrate the local, industrial or social policies of their home governments." *Id.* at 91-92 (footnote omitted). He endorsed the FTAIA as an opportunity to clarify "that effects in foreign markets are the domain of foreign rather than American law" and to "make clear to foreign governments that the protection of competition within their home markets is their responsibility, not the responsibility of the United States." *Id.* at 92.

marks comport with the plain meaning of the FTAIA and reinforce the presumption that Congress enacted this legislation with domestic concerns in mind, and with the intent of requiring the victims of foreign market effects to seek redress in their home markets. It bears repeating in this regard that Statoil is currently pursuing antitrust remedies in Norway based on the same allegations raised in its Amended Complaint.

Petitioner is also mistaken in arguing that the *Statoil* opinion will somehow impair the ability of the U.S. government to prosecute foreign conduct that harms the interests of American consumers. Unlike claimants such as Statoil who complain of the foreign effects of foreign transactions, the U.S. government represents the interests of domestic consumers in prosecuting conduct anywhere in the world that has the proscribed effect on the U.S. marketplace. *See Nippon Paper Industries Co.*, 109 F.3d at 4. Moreover, although the focus of the United States Sentencing Guidelines is on "the impact of defendants' conduct on American business and consumers," *United States Sentencing Guidelines Manual* §§ 2R.1.1, 8C2.1 *et seq.* (1998), nothing in the *Statoil* ruling will impair the government's ability to consider a defendant's worldwide sales in determining the seriousness of the defendant's role in an offense that harms U.S. trade or commerce. *See id.*[17]

Statoil's deterrence argument, if accepted, would nullify the express limitations on Congress' power to regulate foreign commerce and place the United States in the unwanted position of regulating competition throughout the world. The scope of this proposed ex-

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[17] Petitioner appears to confuse jurisdiction (a necessary predicate for prosecution) with the aggravating factors that courts may consider in determining a sentence. *See generally McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

pansion is breathtaking. It would mean that any conspiracy that gives rise to any Sherman Act claim in the United States would open the U.S. courts to treble damage actions for all damages suffered worldwide — whether or not the conduct that injured foreign plaintiffs is prohibited in their own countries, and even if (as here) the alleged injury has no meaningful nexus to U.S. commerce. Statoil's broad policy arguments do not support this unauthorized and unworkable result.

Whether the goal of deterrence would be better served by expanding the jurisdictional reach of the Sherman Act is, respectfully, a consideration better left to Congress. Statoil has asserted its claims of foreign-based injury before the appropriate tribunal in Norway, and requires no intervention by this Court to protect its interests there.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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Respectfully submitted,

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